Nos. 6 and 8

In the Supreme Court of the United States

OCTOBER TERM, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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SEPTEMBER 26, 1957.

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OPINIONS BELOW

The opinion of the three-judge District Court (R. 192–195) is reported at 144 F. Supp. 365. The report of the Interstate Commerce Commission in Docket No. MC–29130 (Sub. No. 70), *The Rock*

Island Motor Transit Company Common Carrier Application, dated November 22, 1954 (R. 93–121), is reported at 63 M. C. C. 91.

JURISDICTION

The judgment of the District Court (R. 195–196) was entered on January 27, 1956, and separate notices of appeal were filed by the appellants on March 23 and 26, 1956 (R. 197–202). The jurisdiction of this Court rests upon 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction of the cases was noted on October 8, 1956, and they were consolidated for oral argument (R. 204).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix A to the brief of the appellants in No. 6.

QUESTIONS PRESENTED

1. Whether the proviso in Section 5 (2) (b) of the Interstate Commerce Act precludes the Commission from authorizing, pursuant to Section 207 (a), a subsidiary of a railroad to provide ordinary motor carrier service at points on or near the railroad to meet a public need for service which other motor carriers cannot or will not provide.

2. Whether the motor carrier service authorized by the Commission was warranted by the Commission's findings and by the evidence as to public convenience and necessity.[1]

[1] In noting probable jurisdiction in these cases, the Court further stated that counsel in No. 8 are invited to discuss the

STATEMENT

This case originated in a complaint (R. 85–93) filed in the court below on July 20, 1955, by American Trucking Associations, Inc., its Regular Common Carrier Conference, and nine motor carriers seeking to set aside the report and order of the Interstate Commerce Commission dated November 22, 1954, which directed the issuance of a certificate of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)) authorizing The Rock Island Motor Transit Company to carry general commodities as a motor common carrier over described routes between Silvis, Illinois, and Omaha, Nebaska. The Iowa State Commerce Commission, The Rock Island Motor Transit Company (hereafter referred to as "applicant" or "Motor Transit"), a committee of its employees, and numerous commercial and shipper organizations from the territory involved were permitted to intervene in support of the Commission's order (R. 172, 173). The Railway Labor Executives' Association, representing

issue of standing to sue. The interest of Railway Labor Executives' Association, et al., the appellants in No. 8, as representatives of the employees of the Chicago, Rock Island and Pacific Railroad, in the subject matter of the Commission's order is somewhat tenuous. However, Section 17 (11) of the Interstate Commerce Act provides that "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding under this act affecting employees." Section 17 (11) is made applicable to motor carrier proceedings under Part II by Section 205 (h), and was applied by this Court in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Ry. Co.*, 331 U. S. 519. Under these circumstances, the appellees have not challenged the standing to sue of the appellants in No. 8.

18 railway labor organizations, the Brotherhood of Railway Trainmen and the Order of Railway Conductors and Brakemen were allowed to intervene in support of the plaintiffs (R. 171). Rock Island Motor Transit Company is a wholly owned subsidiary of the Chicago, Rock Island & Pacific Railroad Company (R. 95).

Answers were filed by the United States (R. 138, 174, and 176), by the Commission (R. 133, 186, and 189) and by the intervening defendants (R. 126, 152, 179, and 183).

Background proceedings. In 1938, the Commission authorized Motor Transit to purchase the property and operating rights of the White Line Motor Freight Company which operated on U. S. Highway 6 between Silvis, Illinois, and Omaha, Nebraska, with the following conditions here pertinent (*The Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co.*, 5 M. C. C. 451, 458):

> that applicant shall not, if the authority herein granted be exercised, render service from or to, or interchange traffic at, any point other than a station on the lines of said railroad; that the authority herein granted shall be subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition.

These conditions, which were accepted by Motor Transit, precluded it from making any use of White

Line operating rights to points which were not stations on the Rock Island.

In 1944, the Commission authorized Motor Transit to acquire the certificates and property of D. H. and J. H. Frederickson, covering routes between Harlan, Atlantic and Oakland in Iowa and Omaha, Nebraska (hereafter referred to as the Frederickson Line), 39 M. C. C. 824.

However, before a certificate covering the Frederickson Line route was issued to Motor Transit, the Commission, in February 1945, reopened that proceeding and the proceeding relating to the White Line acquisition to determine what restrictions, if any, should be imposed to insure that the motor carrier service performed by Motor Transit was limited to that which is auxiliary to, or supplemental of, the rail service of its parent company. Thereafter, the report of the entire Commission on reconsideration, dated March 4, 1946, directed that Motor Transit's operations on the White Line and Frederickson Line routes be subjected to the following five conditions:

> 1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railroad Company, hereinafter called the railroad.
>
> 2. The Rock Island Motor Transit Company shall not render any service to or from any point not a station on a rail line of the railroad.
>
> 3. No shipments shall be transported by The Rock Island Motor Transit Company between

any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.

4. All contractual arrangements between the Rock Island Motor Transit Company and the railroad shall be reported to us and shall be subject to revision, if and as we find it to be necessary, in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

40 M. C. C. 457, 477. Upon further reconsideration, in the course of which Motor Transit offered no evidence as to the public need for its service without such restrictions but only challenged the power of the Commission to impose them, the entire Commission affirmed its decision. 50 M. C. C. 567. The Commission's *power* to impose the quoted restrictions was challenged in the courts by Motor Transit, and was finally sustained by this Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (1951). A certificate of public convenience and necessity containing these restrictions was issued to Motor Transit on September 11, 1951 (R. 96).

However, on August 30, 1951, and prior to the issuance of the certificate dated September 11, the Commission issued to Motor Transit temporary authority to operate over the White Line and Frederickson Line routes, subject to the following restrictions:

(1) No service to be performed for shipments originating at Chicago, Ill., or Omaha, Nebr., and destined to either of said points.

(2) No shipment to be transported between any of the following points or through, or to, or from more than one of said points: Omaha, and collectively Davenport and Bettendorf, Iowa, Rock Island, Moline and East Moline, Ill.

(3) No single shipment to be handled on motor carrier billing weighing more than 2,000 pounds (R. 97).

On November 1, 1951, the weight limitation was increased to a maximum of 5,000 pounds for any one shipment. Since August 30, 1951, Motor Transit has operated under this temporary authority over the routes in question.

The present proceeding. The present proceeding arises out of an application for a permanent certificate of public convenience and necessity under Section 207 (a) of the Act filed by Motor Transit in October 1951. The motor carrier service for which authority was requested in this application is described in detail in the Commission's report (R. 94–95). Leaving aside the requested route segment between Chicago and Silvis, Illinois, which the Commission denied on the ground that Motor Transit already possessed such authority (R. 115–116), the application in substance sought authority to serve named points on the White Line and Frederickson Line routes, plus certain named off-line points, without the restrictions which the Commission had imposed in the certificate dated September 11, 1951. The routes and points involved in the application, together with the population of the points,

are shown on the map attached to this brief as Appendix A.

A hearing on the application was held before a hearing examiner, and consumed 14 days between March 18 and May 22, 1952. In this hearing, in contrast with the prior proceedings reviewed by this Court, Motor Transit presented extensive evidence as to the public need for its motor carrier service in the territory involved in the application. The hearing examiner issued a recommended decision (R. 1–83), exceptions were filed, and oral argument was had before the entire Commission. On November 22, 1954, the Commission issued its report and order (R. 93–122) substantially granting Motor Transit's application, subject to the following conditions (R. 117):

> (1) that there may be attached from time to time the privileges granted herein such reasonable terms, conditions, and limitations as the public convenience and necessity may require, and
>
> (2) that all contractual arrangements between The Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties;

The plaintiffs' petition for reconsideration was denied by the Commission on July 6, 1955 (R. 122–123).

Following briefs and oral argument, the three-judge court, consisting of Circuit Judge Prettyman and District Judges Pine and Holtzoff, on January 11,

1956, rendered its unanimous opinion (R. 192–195) sustaining the Commission's order.

SUMMARY OF ARGUMENT

The Interstate Commerce Commission, pursuant to Section 207 (a) of the Interstate Commerce Act, authorized Rock Island Motor Transit Company, a wholly-owned subsidiary of the Chicago, Rock Island & Pacific Railroad Company, to perform the usual type of motor carrier service between Silvis, Illinois and Omaha, Nebraska, and numerous intermediate points, all of which points are on or near the railroad. In prior proceedings under Section 5 of the Act, arising out of Motor Transit's acquisition from existing motor carriers of operating rights to serve these points, the Commission had imposed upon Motor Transit conditions designed to insure that its motor carrier operations would be limited to service auxiliary to or supplemental of the train service of its rail parent. The Commission's power to impose these conditions was sustained by this Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419. In the instant proceeding, Motor Transit for the first time adduced evidence as to the public need for its motor carrier service without such restrictions. Thereafter, finding that the proposed unrestricted motor carrier operations by Motor Transit will not unduly restrain competition and that there is a public need for the proposed service which independent motor carriers are not providing, the Commission authorized Motor Transit to render ordinary motor carrier service to these points, subject to conditions

which will enable the Commission to impose in the future restrictions or conditions necessary for the protection of independent motor carriers.

The appellants contend that the Commission is precluded from authorizing Motor Transit to perform motor carrier operations which are not restricted to service which is auxiliary to or supplemental to the train service of its parent railroad, by the proviso of Section 5 (2) (b) that before a railroad or its affiliate purchases or otherwise acquires control of an existing motor carrier the Commission must find that "the proposed transaction * * * will enable such [railroad] to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

I

The Commission's order in this case is based upon Section 207 (a) which authorizes the issuance of certificates of public convenience and necessity for new or additional motor carrier service where it finds the applicant to be fit, willing and able and that the proposed service is or will be required by the present or future public convenience and necessity. Section 207 (a) does not contain the limitations upon motor carrier operations by railroads which the proviso of Section 5 (2) (b) imposes where a railroad or its affiliate requires an existing motor carrier operation. However, recognizing that Section 5 (2) (b) and the National Transportation Policy embody a general Congressional policy against railroad monopolization of motor transportation, the Commission, in authorizing new motor carrier operations by a railroad under

Section 207 (a), restricts such operations to service auxiliary and supplemental to the rail service, as it does in acquisition cases under Section 5, except where there is an unusual or special need for such service without restrictions.

The legislative history of Sections 5 (2) (b) and 207 (a) contain no support for the appellants' contention that a railroad's motor carrier operations must be restricted under all circumstances to service on railroad bills of lading and at rail rates and, through key point restrictions, to a local and largely less-than-truckload service. The proviso of Section 5 (2) (b) originated in Section 213 (a) (1) of the Motor Carrier Act of 1935. The history of the 1935 legislation reveals that it was intended to prevent railroad monopolization of motor transportation, and that no one had a precise idea as to the extent to which railroads should be permitted to engage in motor carrier operations. There was no indication as to whether this purpose would be satisfied by limiting a railroad's motor service to points on or near the railroad, or whether such service should be further restricted.

Moreover, there is no suggestion in the legislative history that the proviso of Section 5 (2) (b), applicable by its terms to *acquisitions*, was to be read into Section 207 (a) as a limitation on the Commission's power to authorize new or additional service. Early in the administration of the Motor Carrier Act, the Commission held that what is now the proviso of Section 5 (2) (b) did apply to the issuance of certificates under Section 207 (a). With specific knowledge of

this interpretation, Congress, in amending that Act, dropped as too controversial, an amendment which would have written the proviso into Section 207 (a).

The Commission has never interpreted the proviso of Section 5 (2) (b) and Section 207 (a) as requiring that motor carrier operations by a railroad be limited in all circumstances to service auxiliary and supplemental to the rail service, e. g., on railroad bills of lading and at rail rates and subject to key point restrictions. Even in the early and leading Section 5 acquisition case of *Pennsylvania Truck Lines—Control—Barker Motor Freight,* 5 M. C. C. 9 (1937) in which the Commission began to develop the concept of "auxiliary and supplemental" service, it interpreted the Act as permitting it to omit or remove such restrictions in order to permit a needed transportation service which was not being performed by other carriers.

While the Commission may have held initially that the proviso of Section 5 (2) (b) had no bearing upon the determination of applications for certificates under Section 207 (a), it soon evolved the policy of imposing upon authorizations for railroads to perform new or additional motor carrier service the same auxiliary and supplemental service restrictions which it applied to railroad acquisitions of existing services. At the same time, it consistently held that it could authorize a railroad to perform ordinary or unrestricted motor carrier service to meet an unusual or special public need for service which other motor carriers were not providing.

The Commission's power to authorize a railroad to perform ordinary or unrestricted motor carrier service

to points on or near the railroad, at least where there is a special need for that service, is recognized implicitly by this Court's decisions in *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *American Trucking Assns.* v. *United States,* 326 U. S. 77; *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419; and *United States* v. *Texas & Pacific Motor Transport Co.,* 340 U. S. 450. These decisions hold that both in acquisition cases under Section 5 and in determining applications for certificates under Section 207 (a) the Commission is *empowered* to impose drastic restrictions to insure that a railroad's motor carrier service is auxiliary and supplemental to its rail service. The Court has never held that it must do so in all circumstances. Rather, it has recognized that Section 207 (a) does not contain the restrictions of Section 5 (2) (b), while sustaining the Commission in cases under Section 207 (a) in giving effect to the general Congressional policy against railroad monopolization of motor transportation.

In the *Rock Island* case, this Court pointed out that "The words 'auxiliary to or supplemental' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers." (340 U. S., at 437). Noting that the Commission had in some cases omitted or varied the auxiliary and supplemental conditions so as to meet a public need for transportation, the Court held that "Those divergencies, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission." (340 U. S., at 442). Thus, this

> they can be used to advantage in combination with railroad service and I hope to see the time when the railroads will utilize these opportunities fully.

Clearly, Commissioner Eastman was urging further experimentation in railroad use of motor vehicles.

Other witnesses in these hearings urged in general terms only that railroads should not be allowed to monopolize motor transportation. Thus, witness Blaine stated (p. 337) that

> We are opposed to section 313, which is the merger or consolidation provision of this bill, for this reason:
>
> Under the provisions of that section the railroads can acquire all of your motor trucks and your motor busses and thus restore to them the monopoly which they so long enjoyed. Such a law at this time is contrary to our experience with respect to the past. Up until 1914 the railroads of this country could also engage in the operation of boats in competition with the railroads on the rivers and harbors and lakes but Congress, in its wisdom, in 1914 enacted paragraph 19 of section 5 of the Interstate Commerce Act which, briefly stated, prohibits a railroad operating a water vessel in competition with its rail lines. Yet, here it is proposed to write into the Motor Vehicle Act a law contrary to the last action of Congress.

And another witness (Fulbright) suggested (p. 376) that

> "if you are going to have any provision for acquisition of control, it ought to be particularly specified in there that there could not be

acquisition of control when that acquisition would substantially destroy existing competition."

Both committee reports (Sen. Rep. 482 and H. Rep. 1645, 74th Cong., 1st Sess.) made no reference to the subject of railroad operation of motor carriers.

However, as S. 1629 (which was finally enacted as Part II of the Interstate Commerce Act) was reported by the Senate Committee, Section 213 (a) (1) contained the following added language:

> *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition (79th Cong. Rec. 5666).

Senator Wheeler explained the Committee amendment as follows:

> Carriers by rail, express, or water are permitted to consolidate or merge with motor carriers or to obtain control in any of the ways indicated above, but only on a showing that "the transaction proposed will promote the public interest and enable such a carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." With this limitation, it will be possible for the Com-

Court has already recognized that the proviso of Section 5 (2) (b) is not to be read into Section 207 (a) as a rigid limitation, that it does not embody the specific set of restrictions for which appellants contend, and that it does not preclude the Commission from authorizing ordinary and unrestricted motor carrier service by a railroad to points on or near the railroad to satisfy a public need for transportation service which other carriers are not providing.

II

The Commission held in this case that its general policy of imposing auxiliary and supplemental restrictions upon grants of motor carrier operating authority to railroads "should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience." The Commission's findings that these conditions exist in the present case are based upon substantial evidence.

The Commission's conclusion that unrestricted motor carrier operations by Motor Transit over the routes in question would not unduly restrain competition, is based largely upon the record of its past operations, rather than upon prophecy. Motor Transit conducted unrestricted motor carrier operations over the White Line route for 13 years prior to 1951 and over the Frederickson Line route for

seven years prior to 1951. The Commission found that during those years Motor Transit's independent motor carrier competitors prospered greatly, from which it concluded that "the operations of applicant have not unduly restrained competition." Taking into account the appellants' contention that Motor Transit might be unfairly subsidized by its parent railroad, the Commission retained the condition, sustained by this Court in the *Rock Island* case, that contractual arrangements between Motor Transit and the railroad be reported to and be subject to revision by the Commission. In addition, for the express purpose of protecting independent motor carriers from injury due to material changes in their relationship to Motor Transit, the Commission reserved the power to impose further conditions and limitations upon the authority granted to Motor Transit.

As to the public need for unrestricted motor carrier service by Motor Transit, the Commission found that "Applicant is the only carrier that for a considerable number of years has maintained daily (generally at least 5 days a week) scheduled peddle operations over the entire White Line and Frederickson Line routes regardless of the volume of traffic available for movement in such operations." It found from the testimony of many shippers that "public convenience and necessity require the proposed less-than-truckload peddle operations." It found that since Motor Transit possessed exclusive intrastate rights over these routes, other carriers could not perform such a service with interstate traffic only. It further concluded that while the proof of public need for truckload service

by Motor Transit was not as convincing, it should be permitted to share in the more profitable truckload traffic as well as to perform the expensive peddle service. The Commission's action was a rational exercise of the broad discretion conferred upon it by Congress to determine what transportation service is required by the public convenience and necessity. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65.

ARGUMENT

I

The Commission is empowered under Section 207 (a) to authorize a railroad-controlled motor carrier to perform ordinary motor-carrier service to points on or near the line of the railroad, at least in the special circumstances of this case

Preliminary analysis

Since the appellants contend that the Commission's order makes possible railroad domination of motor transportation, it is important to point out the precise scope and effect of the Commission's action. In 1938 and 1944, the Commission, acting under Section 5 of the Interstate Commerce Act, authorized Rock Island Motor Transit to acquire by purchase the operating rights and properties embraced in the White Line and Frederickson routes, respectively. In authorizing acquisitions of the White Line properties, the Commission required Motor Transit to abandon White's operating rights other than common carrier rights between Omaha and Chicago (and two branch routes to Muscatine and Cedar Rapids), and further provided that Motor Transit could not "render service from or to, or interchange traffic at, any point other than a sta-

tion on the lines of" the Rock Island railroad (5 M. C. C., at 458). Thus, beginning in 1938, the Commission restricted Motor Transit to serving points on the White Line route which were already stations on the Rock Island railroad. Similarly, in 1944, the Commission authorized Motor Transit to acquire by purchase the Frederickson operating rights between Atlantic, Iowa, and Omaha, thereby providing Motor Transit with a second route via Avoca and Neola between those points, together with rights between Atlantic and Oakland and Harlan and Oakland to serve points which are on or near the line of the Rock Island railroad. In 1949, the Commission issued an order further restricting Motor Transit's operations on the White Line and Frederickson routes by imposing the five conditions sustained by this Court in *United States* v. *Rock Island Motor Transit Co., supra.* For present purposes, these conditions may be summarized as (1) restricting its motor carrier operations to movements at rail rates and on rail bills of lading, thus precluding Motor Transit from entering into joint rates with other motor carriers, (2) restricting its service (as before) to points which are stations on the Rock Island railroad, (3) prohibiting it from carrying shipments between any of the following points, or through, or to, or from, more than one of such points: Omaha, Des Moines, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill., thereby, in practical effect, limiting Motor Transit's motor carrier service to carrying rail-billed shipments, in large part less-than-truckload, between one of these key

points and the smaller points intermediate to the next key point.

In the instant case, the Commission, acting under Section 207 (a), has authorized Motor Transit to render motor carrier service without these restrictions *but only to the same points on or near the line of the Rock Island railroad.*

The appellants contend that when a railroad or railroad affiliate applies for a motor carrier certificate of public convenience and necessity under Section 207 of the Interstate Commerce Act, it may be granted only in accordance with the requirement of Section 5 (2) (b) that such transaction will enable the railroad "to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." They assert that this condition of Section 5 (2) (b) must be read into Section 207 (a) and that this means that the Commission's grant of a certificate to Rock Island Motor Transit Company was required to contain conditions (such as those which were involved in *United States* v. *Rock Island Motor Transit Co., supra*), which would limit its motor carrier operations not only to points on or near the railroad but also to a type of service which would be made "auxiliary and supplemental" to the rail service by the key point and rail rate and billing restrictions described above.

We contend that when a rail carrier or its affiliate applies for a motor carrier certificate under Section 207 (a), the limitations of Section 5 (2) (b) applicable to *acquisitions* of existing motor carriers by a railroad or its affiliate do not apply as a rigid restriction upon

the authorization of new or additional motor carrier service. However, since the Commission has recognized in Section 5 (2) (b) and in the National Transportation Policy a general Congressional purpose to prevent railroad monopolization of motor transportation, it has given railroads authority under Section 207 (a) to conduct ordinary motor carrier operations only in "special circumstances," i. e., only to meet an unusual public need for transportation. In any event, whether the proviso of Section 5 (2) (b) is regarded as fully applicable to proceedings under Section 207 (a) or, as the court below held, as a general policy to be taken into account by the Commission, it is not offended where, as here, the Commission seeks to meet special transportation needs by authorizing a railroad controlled motor carrier to furnish ordinary motor carrier service only to points on or near the rail line.

Thus, the precise issue here is whether in such circumstances the Commission may issue a certificate of public convenience and necessity to a railroad affiliate without restricting the authorized motor carrier operations to service auxiliary and supplemental to rail service, while reserving the right to impose upon such motor carrier operations in the future such limitations as the public convenience and necessity may require, and to regulate the contractual relations between such carrier and its railroad parent. In the instant case, the Commission has held, and the court below agreed, that nothing in the Act precludes it from authorizing such motor service to points on or near the railroad "where the circumstances clearly

establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience" (R. 108). We submit that this view is supported by the language, history and purpose of Sections 5 and 207, by the Commission's consistent administrative construction, and by the decisions of this Court.

A. By its terms, the proviso of Section 5 (2) (b) applies only to railroad acquisitions of existing motor carriers, and does not restrict the issuance of certificates under Section 207 (a) authorizing new motor carrier service

The Commission's order in this case was based upon Sections 207 (a) and 208 of the Interstate Commerce Act. Section 207 (a) provides that "Subject to section 210", a certificate authorizing motor carrier operations shall be issued "to *any* qualified applicant" if it is found that the applicant is fit, willing, and able to perform the proposed service and that the proposed service "is or will be required by the present or future public convenience and necessity." Section 208 generally empowers the Commission to include in such a certificate "at the time of issuance and from time to time thereafter" conditions and limitations required by the public convenience and necessity.

It is significant that Section 207 (a) contains no provision requiring the imposition of unusual restrictions upon certificates issued to motor carrier subsidiaries of railroads. Applying the rule that statutes mean what they say, this fact alone should be persuasive here.

Moreover, Section 207 (a) begins with the words "Subject to section 210." This compels the inference that Congress has thereby enumerated the other provisions of the Act which it desires to override or limit the powers granted in Section 207. This normal inference is heavily reinforced when it is noted that Section 210 prohibits a contract motor carrier or its affiliate from holding a common carrier certificate under Section 207, unless the Commission approves such dual operation as being in the public interest. That is, at the very beginning of Section 207, Congress enumerated the types of dual transportation operations which it did not wish to be authorized without restriction in the administration of Section 207. Looking only to the structure of these sections and applying ordinary rules of interpretation, it can only be concluded that by not similarly referring to the proviso in Section 5 (2) (b), Congress did not intend to write its limitation into Section 207.[2] And, as noted hereafter, Congress did not do so later when it was specifically informed that the Commission had not been applying rigidly the proviso of Section 5 (2) (b) (or its predecessor Section 213 (a) (1)), in administering Section 207 (a). (*Infra*, pp. 33–37.)

It is argued by the appellants that if the limitations of Section 5 (2) (b) are not read into Section 207 (a)

[2] *Brown* v. *Maryland*, 12 Wheaton 419, 438; *Bend* v. *Hoyt*, 13 Peters 263, 272; *United States* v. *Dickson*, 15 Peters 141, 165; *Schlemmer* v. *Buffalo R. & P. Ry.*, 205 U. S. 1, 10; *American Express Co.* v. *United States*, 212 U. S. 522, 534; *Hopkins* v. *United States*, 235 Fed. 95, 98; *Rybolt* v. *Jarrett*, 112 F. 2d 642, 645 (CA 4, 1940).

the policy of Section 5 (2) (b) will be completely thwarted. To the contrary, we submit that Section 5 (2) (b) and Section 207 (a) embody different Congressional objectives which the Commission has reconciled correctly.

If a railroad or its affiliate seeks to purchase or otherwise acquire control of an existing motor carrier, it must obtain the Commission's approval under Section 5. Under Section 5 (2) (b) such approval by the Commission must be predicated upon its findings that the proposed transaction (1) will be consistent with the public interest, (2) will enable such rail carrier to use service by motor carrier to public advantage in its operations, and (3) will not unduly restrain competition. These conditions of Section 5 (2) (b) are essentially anti-monopoly provisions designed to assure that the railroads do not use their financial resources to swallow up by acquisitions and mergers the motor carrier industry. (See *infra*, pp. 27–31.)

In contrast, while the proviso of Section 5 (2) (b) deals with acquisitions of existing motor carriers, Section 207 (a) governs the issuance of certificates of public convenience and necessity for new or additional motor carrier service. The first requirement of Section 207 (a) is that the applicant for such a certificate be fit, willing, and able properly to perform the proposed service. In the instant case, the appellants have not challenged the fitness, willingness, or ability of Rock Island Motor Transit Company to perform the motor carrier service which it proposes. The second and only other condition of Section 207

is that the proposed motor carrier service, to the extent authorized by the Commission, "is or will be required by the present or future public convenience or necessity."

In brief, Section 5 (2) (b) prescribes for railroad *acquisitions* of motor carriers an essentially anti-monopoly test, i. e., that the acquisition will enable the railroad to use service by motor carrier to public advantage in its operations, and will not unduly restrain competition. Section 207, on the other hand, places its emphasis on the public convenience and necessity, i. e., the public need for new or additional transportation service.

It is clear why Congress has not written into Section 207 the anti-monopoly provisions of Section 5 (2) (b). Where a railroad or its affiliate acquires by purchase or merger an existing motor carrier, there is lost the actual or potential competition between the railroad and the previously independent motor carrier. However, where a railroad or its affiliate undertakes to commence or expand its own motor carrier service, it can only do so in *added* competition with independent motor carriers already in the field. This economic distinction was pointed out to Congress in 1938 by a representative of the railroads in opposition to the Shipstead amendment which would have repeated in Section 207 the proviso of the present Section 5 (2) (b), in accordance with the plaintiffs' present contention. *Hearings before the Subcommittee of Senate Committee on Interstate Commerce on S. 3606, 75th Cong., 3d Sess., pp. 157, 164.* (See, *infra*, p. 35.)

Again, it is urged by appellants that under a construction of Section 207 which permits railroads to engage in unrestricted motor carrier operations, their superior financial resources, including the use of railroad terminal facilities and personnel, inevitably will enable them to eliminate the independent motor carriers. The Commission has met this possibility in two ways: first, by authorizing such unrestricted motor carrier operations by a railroad or its affiliate only in "exceptional circumstances", i. e., to meet an unsatisfied public need for transportation at points on or near the railroad without producing an undue restraint of competition, and second, as in the instant case, by subjecting such a grant of authority to such future conditions as may be required by the public convenience and necessity. And, in the instant case, the Commission specifically considered the possibility that Motor Transit might be unfairly subsidized by its rail parent (R. 104) and guarded against it by requiring that contractual arrangements between Motor Transit and its parent be reported to the Commission and subject to revision by the Commission.

This Court has recognized that Congressional directives against rail domination of motor carriage and to satisfy the public need for transportation "must frequently produce overlapping aims." *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 66. The Commission has consistently recognized its duty to reconcile and balance these statutory purposes to achieve the basic national objective of an adequate, diversified and healthy transportation sys-

tem. While Section 207 (a), authorizing the issuance of certificates of public convenience and necessity for new or additional motor carrier service, does not contain the express anti-railroad control provisions of Section 5 (2) (b), the Commission has considered that Congress did not intend Section 207 to be an unlimited opportunity for railroad domination of motor transportation, thus thwarting both the policy proviso of Section 5 (2) (b) and the National Transportation Policy. If, in administering Section 207, the Commission ignored the purpose of Section 5 (2) (b) and the National Transportation Policy, it would mean that a railroad which acquired a motor carrier subject to the limitations of Section 5 (2) (b), could turn around and seek an authorization for additional motor carrier service under Section 207 without regard to the policy of Section 5 (2) (b).

Accordingly, as pointed out later in this brief, in issuing to railroads or their affiliates certificates for new or additional motor carrier service under Section 207, the Commission has applied the general policy of Section 5 (2) (b) by restricting such motor carrier operations to service auxiliary and supplementary to the rail service, unless there existed an unusual or special public need for ordinary motor carrier service which is not being performed by the authorized independent motor carriers. Moreover, in the instant case, the ordinary type of motor carrier service which Motor Transit has been authorized to perform is still restricted to points which are stations on the Rock Island Railroad, plus a few small points near the railroad.

B. The legislative history contains no indication that the proviso of Section 5 (2) (b) was intended (1) to restrict a railroad's motor carrier operations to less-than-truckload movements to smaller points on rail billing and at rail rates, or (2) to be applied as a rigid limitation upon Section 207 (a)

As noted above, the appellants' specific contention here is that the proviso of Section 5 (2) (b) requires the Commission in all circumstances to restrict a railroad's motor carrier operations to largely less-than-truckload movements to smaller points and on railroad bills of lading and at rail rates (thereby, as a practical matter, precluding it from interchanging freight with other motor carriers or participating in joint motor rates). Similarly, they urge this Court to reverse its decision in *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, and to hold that the proviso of Section 5 (2) (b) requires that a railroad must be restricted in its motor carrier operations to freight which has a prior or subsequent movement by rail. And they contend that the proviso, so interpreted, applies as a rigid restriction, regardless of circumstances, upon the authorization of new or additional service under Section 207. These contentions find no support in the legislative history of the proviso in Section 5 (formerly Section 213 (a) (1)) and of Section 207.

The original Motor Carrier Act of 1935. The principal conclusion which can be drawn from the legislative history of the Motor Carrier Act of 1935 is that no one concerned had any precise idea as to the extent to which railroads should be allowed to engage in motor transportation. In 1928, a published report of the Interstate Commerce Commission (*Motor Bus*

and Motor Truck Operation, 140 I. C. C. 685, 720) indicated that the railroads were making practically no use of truck transportation. In 1933, five years later, another study by the Commission revealed active experimentation in motor transportation by railroads. *Coordination of Motor Transportation,* 182 I. C. C. 263, 375. As Section 213 appeared in H. R. 5262 and S. 1629, both 74th Congress, 1st Sess. (1935), which were the subject of hearings before the House Committee on Interstate and Foreign Commerce and the Senate Committee on Interstate Commerce, it simply prohibited mergers and acquisitions of control without the prior approval of the Commission based upon a finding that "the public interest will be promoted by the transactions proposed." Railroad operation of motor carriers received little discussion at these 1935 hearings which immediately preceded enactment of the Motor Carrier Act. Thus, in the February 1935 hearings before the House Committee (entitled Regulation of Interstate Motor Carriers), Commissioner Eastman made the following general statement (p. 46):

> I hope and expect to see the railroads utilize these motor vehicles in their own operations to a much greater extent than they now do. They are doing it to a considerable extent; they operate some; they have abandoned branch lines and they are operating busses instead of trains in some cases. They are utilizing motor vehicles in their terminal operations and they have used them as a substitute for way freight service, in some cases. My own view is that there will be found many more ways where

> mission *to allow acquisitions* which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests [Emphasis added] (79th Cong. Rec. 5655 [3]).

In short, the complaints and fears that led to the insertion of the proviso in Section 213 (a) related only to unlimited railroad *acquisition* of existing motor carriers, and to the destruction of competition by such *acquisitions*. No attempt was made by anyone to define the clause in Section 213 (now the proviso in Section 5 (2) (b)) that such acquired motor carrier operations "will enable such carrier [other than a motor carrier] to use service by motor vehicle to public advantage in its operations." Clearly, it meant that railroads were not, by acquisition of existing motor carriers, to engage in motor carrier transportation wholly unrelated to their previous transportation operations. Specifically, the extent to which a railroad could render motor carrier service to points which it already served by rail was nowhere defined or

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[3] In the later House debate, Representative Sadowski characterized Section 213 in the following terms:

Section 213 provides that *the Commission shall control the consolidation, merger, and acquisition of control of motor carriers*. I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor-carrier industry, *that the acquisition of control of the carriers* be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation [Emphasis added] (79th Cong. Rec. 12206).

discussed. There was not even a suggestion that, as appellants contend, a railroad's motor carrier operations must be limited to local less-than-truckload shipments on rail billing and at rail rates.

In any event, *the legislative history contains no suggestion that the proviso in Section 213 (a) (1) was to be read into Section 207 as a rigid limitation on the Commission's power to issue certificates of public convenience and necessity for new motor service.*

The 1938 amendments. In 1938, Congress, with specific knowledge that the Commission was not applying the proviso of Section 213 (a) (1) as a rigid limitation in cases under Section 207, refused to write the proviso into Section 207.

Shortly after enactment of the Motor Carrier Act, the Commission decided *Pennsylvania Truck Lines, Inc.—Control—Barker,* 1 M. C. C. 101 (1936), containing what the motor carrier appellants describe (App. br. in No. 6, p. 19) as "the classic statement of the rationale underlying the separation of rail and truck ownership or control." That case involved an application under Section 213 (now Section 5) for approval of a purchase of an independent motor carrier by a railroad. It marked the beginning of the development of the policy under which (except in a few cases involving special circumstances) the Commission has given effect to the objective of the proviso of Section 5 by approving *acquisitions* of motor carriers by railroads or their affiliates only upon conditions that in one way or another confine the motor carrier operations to service "auxiliary and supple-

mental" to the railroad operations. As we point out elsewhere (*infra,* p. 38), even in this early and leading *Barker* case, the Commission added that it would relax such conditions to meet shippers' need for service.

However, in 1937, the Commission decided *St. Andrews Bay Transportation Company Extension of Operations,* 3 M. C. C. 711 (1937), which involved an application under Section 207 by a railroad-controlled motor carrier for a certificate authorizing an extension of its existing motor carrier operations carried on pursuant to a certificate issued under the grandfather clause of the Motor Carrier Act. In authorizing the extension, the Commission rejected the contention of protesting rail carriers that the proviso of Section 213 was controlling, in the following language (at p. 715):

> The situation presented in the *Barker* case differs from that here presented. The application in that case was filed under section 213 of the act, which provides with respect to consolidations, mergers, and acquisitions of control that if the applicant be a carrier other than a motor carrier, or a company controlled by or affiliated with such a carrier other than a motor carrier, we shall not give our approval unless we find "that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." The application herein, on the other hand, is for a certificate of public convenience and necessity authorizing institution of a new

> operation and was filed under section 207 (a) of the act, which provides that, subject to section 210, a certificate shall be issued to any qualified applicant therefor, if it be found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of the act and our requirements, rules, and regulations thereunder, and that the proposed service is or will be required by the present or future public convenience and necessity.

Thus, in 1937, the Commission squarely held that the proviso of Section 213 (a) (1) was not to be read into Section 207 as an absolute limitation on the issuance of certificates of public convenience and necessity to railroads or their affiliates.

During the Congressional consideration of the 1938 amendments to the Motor Carrier Act, the *Barker* and *St. Andrews Bay* decisions were reviewed specifically. Thus, during the hearings before the Senate Subcommittee on Interstate Commerce on S. 3606, 75th Cong., 3rd Sess., Senator Shipstead proposed an amendment which would have repeated in Section 207 the proviso of Section 213 (a) (1). Senator Shipstead explained his amendment as follows (Hearings, ibid, p. 26):

> * * * The original act permits railroads under certain conditions to operate and to acquire and operate busses, as auxiliary to, or supplementary to, their regular service. I do not know that there is any objection to that. But it appeared clearly the intention of Congress that they should be prohibited from acquiring or initiating motor truck or bus service under certain other conditions. And the ques-

> tion arose after two decisions by the Motor Carrier Division of the Interstate Commerce Commission, where it appeared to many people that there was a conflict in that Division as to the intention of Congress in respect to that matter. *Those two cases were the Pennsylvania Truck Line case and the St. Andrews Bay Transportation Co. case.* [Emphasis added.]

During the same hearings, Interstate Commerce Commissioner Eastman stated that

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> In fact, so far as I personally am concerned, I do not want to pass on issues in advance; but if I had to pass on the issue now, I should say that in administering the provisions of Section 207, it would be the duty of the Commission to read the act as a whole and to apply the same policy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of Section 213 (*Ibid.* 27, 30).

Commissioner Eastman also submitted a letter on behalf of Commissioners Lee, Rogers and himself (who comprised the Commission's Division 5 which had decided the *St. Andrews Bay Transportation Company* case) stating that they did not oppose the Shipstead amendment. However, this letter states that it had not been referred to the full Commission (*Ibid.* pp. 30–31).

Moreover, both Senator Johnson and Commissioner Eastman warned that the Shipstead amendment would add controversy to a bill on which there was substantially unanimous agreement (*Ibid.* 29, 30). This prediction was realized when later in the hearings a rep-

resentative of American Trucking Associations, Inc., strongly supported the Shipstead amendment (*Ibid.* pp. 128–129), while it was opposed with equal vigor by a representative of the Association of American Railroads (*Ibid.* pp. 157–164), who pointed out that Commissioner Eastman had consulted only two other members of the Commission (*Ibid.* p. 158).

Senator Shipstead withdrew his amendment, stating that (*Ibid.* 141–142):

> And it is quite evident that, even with the controversy aroused here, it would be, if not a waste of time, futile to try to pass my amendment at this session of Congress. On the other hand, I have come to the conclusion it is not necessary to press it at this time.

However, it is clear that the Senate Committee recognized that the Shipstead amendment had been withdrawn because it was controversial—rather than because it was unnecessary under existing law. Thus, the report of the subcommittee which was signed by Senator Shipstead and adopted by the full Senate Committee, contains the following explanation (Sen. Rep. 1650, 75th Cong. 3rd Sess. p. 3):

> Senator Shipstead introduced a clarifying amendment to S. 3606 which, he stated, is designed to give effect to the intent of Congress that the same showing be made by a carrier other than a motor carrier applying under section 207 (a) of the Motor Carrier Act, 1935, to obtain a certificate of public convenience and necessity as is required by such carrier to obtain approval of the purchase or acquisition of a motor carrier. At the hearings upon S. 3606,

following the testimony of Commissioner Eastman that the Commission had no objection to the amendment, that in his view the present act should be interpreted to give effect to the purpose of the clarifying amendment, and that if the Shipstead amendment was pressed at this time it might delay the other amendments proposed by the Commission, Senator Shipstead withdrew his amendment.

* * * While several of these amendments seem to have merit, none of them has been approved by your subcommittee or recommended for adoption for the reasons which actuated Senator Shipstead in the withdrawal of his amendment, that is, that they are largely controversial and might delay or defeat the prompt enactment of the procedural and clarifying amendments which are of importance to the Interstate Commerce Commission in attempting to perform the vast task before it in the regulation of motor carriers.

In brief, Congress was specifically aware in 1938 that the Commission was not applying the limitation on acquisitions in the proviso of Section 213 (a) (1) in determining application by railroads or their affiliates for motor carrier certificates under Section 207. With this knowledge, Senator Shipstead's amendment, which was designed to reverse the Commission's conclusion as stated in the *St. Andrews Bay Transportation Co.* case, was dropped as too controversial.

The Transportation Act of 1940. In 1940, the Interstate Commerce Act, including the Motor Carrier Act, was subjected to a general overhaul and rearrangement by the Transportation Act of 1940. Not-

withstanding the 1938 controversy over the proper relationship between Section 213 (a) (1) and 207, the 1940 Act merely transferred the proviso of Section 213 (a) (1) to Section 5 (2) (b) of the present Act, while leaving Section 207 (a) unchanged in any respect. Indeed, between the *St. Andrews Bay Transportation* case, *supra*, and February 1940, the Commission had at least twice reiterated its view that Section 213 was not controlling in cases under Section 207. *Interstate Transit Lines Extension—Verdon, Nebraska*, 10 M. C. C. 665, 667; *Santa Fe Trail Stages, Inc. Common Carrier Application*, 21 M. C. C. 725, 753.

In brief, with specific knowledge of the issue, Congress declined to avail itself of opportunities in 1938 and 1940 to write the proviso into Section 207. This is persuasive evidence that the Commission has correctly interpreted the will of Congress. *United States v. American Trucking Associations*, 310 U. S. 534, 549–550. Specifically, we submit that this history shows that in 1938 and 1940, as in 1935, Congress was not ready to specify for all times and circumstances the precise motor carrier operations which railroads should be permitted to perform in the public interest. It demonstrates the validity of this Court's conclusion in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S., at 442, that "Those divergencies, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission. It is because Congress could not deal with the multitudinous and variable situations which arise that the Commission was given authority to adjust services within the limits of the Motor Carrier Act."

C. The Commission has consistently interpreted the Act as empowering it, in special circumstances, to issue to a rail-controlled motor carrier a certificate under Section 207 (a) authorizing ordinary or unrestricted motor service to points on or near the railroad

The Commission has never construed the proviso of Section 5 (2) (b) and Section 207 as rigidly restricting railroad-controlled motor carrier operations to service which is "auxiliary and supplemental" to the railroad service, e. g., as the appellants insist, to serve on rail billing and at rail rates and subject to key point restrictions.

In the early and leading Section 5 acquisition case of *Pennsylvania Truck Lines, Inc.—Control—Barker Motor Freight, Inc.*, (report on reconsideration) 5 M. C. C. (1937) 9, 11–12, the Commission restricted the rail-controlled motor carrier service to points which were stations on the railroad, and added that

> Approved operations are those which are auxiliary or supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.

However, in the same report (at p. 14), the Commission specifically stated that

> Should the restriction prohibiting service to points which are not Pennsylvania stations make it impracticable or uneconomical to operate over any route, steps may be taken to obtain modification of the terms of the authority granted herein.

and that

> Nor do our conclusions overlook the interests of the shipping public along the routes here considered. If as a result of proceedings initiated by shippers it is shown, after full hearing, that existing transportation facilites are inadequate or otherwise unsatisfactory at a point in connection with which service is prohibited under the terms of the order herein, such evidence may be a basis for our removing the restriction in the pertinent certificate and ordering the present applicants to render service to that point.

The concept of service "auxiliary to and supplemental of" rail service was further defined in *Texas & Pacific Motor Transport Co. Common Carrier Application*, 41 M. C. C. (1943) 721, 726, as follows:

> Condition 1 limits the character of service to be performed by the petitioner to that which is auxiliary to or supplemental of the rail service of the railway. It limits the service to be performed by truck to the transportation of the rail traffic of the railway. It permits the public to receive an improved rail service through the use of trucks instead of trains as a means of fulfilling the railway's undertaking to transport. * * * Condition 1 permits all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading. To and from certain points on segments of the rail lines, the improved service was to be accomplished by performing the movements partly by train and partly by motor vehicle, an auxiliary or supplemental service coordinated with the train service, hence condition 3. Since

> petitioner's certificates limit the service to be performed to that which is auxiliary to or supplemental of the rail service of the railway, it is without authority to engage in operations unconnected with the rail service and, accordingly, may not properly be a party to tariffs containing all-motor or joint rates, nor participate in a directory providing for the substitution of train service for motor-vehicle service at its option.

Notwithstanding this detailed emphasis on the restrictions to be placed upon rail-controlled motor carrier operations, the Commission, even in acquisition cases under Section 5, has refrained from imposing the auxiliary and supplemental condition where there was a need for unrestricted motor service to points on the railroad (or even off it) which other motor carriers could not or would not furnish. *Pacific Motor Trucking Co.—Purchase—Lowinel Trucking Co.*, 60 M. C. C. 373 (1954).

As noted above, in the *St. Andrews Bay Transportation Co.* case, the Commission used broad language suggesting that the proviso of Section 213 (now in Section 5 (2) (b)) was entirely inapplicable to the determination under Section 207 of applications by railroads or their affiliates for certificates of public convenience and necessity authorizing new or additional motor carrier service. However, in that and in succeeding cases under Section 207 the Commission emphasized the public need for the new and additional motor carrier service to be performed by the railroad-controlled motor carrier applicant. Similarly, in *In-*

terstate Transit Lines Extension—Verdon, Nebraska, 10 M. C. C. 665, the Commission, after citing the *St. Andrews Bay Transportation Co.* case, again emphasized the public need for adequate service in rejecting the objection of a competing rail carrier based upon the *Barker* case, and issued to a railroad-controlled motor carrier a certificate under Section 207 not restricted to service auxiliary and supplemental to the rail service. Similarly, in *Santa Fe Trail Stages, Inc., Common Carrier Application,* 21 M. C. C. 725, 753 (1940), involving an application under Section 207 for an extension of service by a railroad-controlled motor carrier, the Commission stated that

> * * * protestants also urge that approval of the considered extensions would be contrary to the principle announced in *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.,* 1 M. C. C. 101, 5 M. C. C. 9 and 49, otherwise known as the *Barker* case. Therein we approved the acquisition of a motortruck line by a railroad truck subsidiary, but conditioned our authorization to exclude the privilege of rendering service from or to, or interchanging traffic at, any point not a station on the railroad. While it may be conceded that the applicant herein serves points not served by the Santa Fe Railway and that to some extent its extensions do not strictly parallel the Santa Fe rails, we are of the opinion that the principle there announced has no application in the instant proceeding, wherein the controlling issue is whether the public needs the service proposed, and not, as in a proceeding under section 213, the propriety of permitting a rail carrier

to take over an existing and competing motor-carrier service.

In *Burlington Transportation Co. Extension—Council Bluffs,* 28 M. C. C. 783, the Commission in authorizing an extension of motor carrier service under Section 207 by a railroad-controlled motor carrier, again distinguished the *Barker* case as involving an acquisition (citing *St. Andrews Bay Transportation Co.* and *Interstate Transit Lines Extension, supra*) and emphasized that only the applicant's proposed service would satisfy a public need for transportation.

In *Rock Island Motor Transit Co. Extension—Wellman, Iowa,* 31 M. C. C. 643, the full Commission in removing auxiliary and supplemental service conditions which Division 5 had imposed in authorizing an extension of service under Section 207 by a railroad-controlled motor carrier, stated (p. 645):

> The fact that applicant is a rail subsidiary is unimportant. The proposed operation is limited to points served by the parent company which are in need of a regular-route common-carrier service in the transportation of general commodities irrespective of the rail service which includes service at several other points on the branch line. It will neither invade territory of other rail lines, endanger or impair the operations of existing motor carriers, nor eliminate the necessity for way-freight train service over the branch line. We are of the opinion that the authority requested should be granted without restriction. * * *.

In *Texas & Pac. Motor Transport Co. Extension.—Point Blue, La.,* 47 M. C. C. 425, 427, the Commission

issued a certificate under Section 207 authorizing a railroad-controlled motor carrier to provide motor carrier service for two towns which had been points on a recently abandoned branch line of the railroad. Although motor carrier service to these points could not be regarded as auxiliary or supplemental to rail service, the Commission noted that

> Businesses have been established in reliance upon transportation furnished by the railway and it should be permitted to continue supplying service through its motor affiliate in the absence of any adequate service by any other carrier. In these circumstances, a grant to applicant of unrestricted authority to serve the two considered points is justified notwithstanding its control by the railway.

See also *Santa Fe Trail Transportation Co. Extension—Joplin,* 44 M. C. C. 474. And see also *Burlington Truck Lines, Inc., Extension—Iowa,* 48 M. C. C. 516 (1948) in which the Commission noting that "We have, on occasion, granted unrestricted authority to rail applicants if warranted by special circumstances," authorized unrestricted service between certain points by a railroad-controlled motor carrier where there was a need for service not furnished by any other carrier.[4]

Simultaneously with the line of decisions referred to above, the Commission developed and applied the

[4] It should be noted that in a number of the cases just discussed, the Commission reversed its Division 5 which, in 1938, had advised the Senate Committee on Interstate Commerce that it (the Division) had no objection to the Shipstead amendment.

corresponding general policy that in the absence of special circumstances it would impose upon grants of motor carrier authority under Section 207 (a) to railroad-controlled motor carriers conditions insuring that such service would be auxiliary and supplemental to the railroad service. The development of such conditions began, as a practical matter, in *Kansas City Southern Transport Co., Inc. Common Carrier Application,* 10 M. C. C. 221 (1938); 28 M. C. C. 5 (1941).

The Commission's views as to the relationship between the proviso of Section 5 (2) (b) and Section 207 (a) were fully stated in *Rock Island Motor Transit Co.-Purchase-White Line Motor Freight, Inc.,* 40 M. C. C. 457 (1946) in which it imposed upon Motor Transit's operations the five conditions previously considered by this Court, and in its report in the instant proceeding. Thus, in the prior proceeding, the Commission stated its position as follows:

> Section 207 of the act, providing for the issuance of certificates of public convenience and necessity authorizing operations as a common carrier by motor vehicle, has never contained any provision paralleling the proviso of section 213 (now section 5) which requires special justification of acquisitions by railroads of motor-carrier operating rights. Giving effect, however, to the national transportation policy as declared by the Congress, and as colored by the provisos of sections 5 and 213, it has consistently been recognized in proceedings under section 207 that the preservation of the inherent advantages of motor-carrier service, the

promotion of efficient motor-carrier service and of sound economic conditions in the motor-carrier industry, the avoidance of unfair and destructive competitive practices, and the development of an adequate transportation system employing in coordination all available agencies make it inconsistent with the public interest, and *a priori* something not required by public convenience and necessity, for railroads directly or indirectly through an affiliate to engage, *except in special circumstances*, in motor-carrier operations other than those auxiliary to, and supplemental of, their own train service and designed to be coordinated with train service to produce in effect a new and improved type of coordinated motor-rail service [Emphasis added.] (40 M. C. C., at 466).

* * * * *

It is our opinion, originally indicated in the *Kansas City Southern* case and confirmed by nearly a decade of experience in motor-carrier regulation, that the preservation of the inherent advantages of motor-carrier service and of healthy competition between railroads and motor carriers and the promotion of economical and efficient transportation service by all modes of transportation and of sound conditions in the transportation and among the several carriers, in short the accomplishment of the purposes forming the national transportation policy, require that, *except where unusual circumstances prevail*, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise

should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

We appreciate, of course, that section 207, unlike section 5, does not require of a railroad, undertaking to prove that public convenience and necessity require a motor service which it proposes, any greater measure of proof than is required by any other applicant. But this does not mean that it is as easy for one applicant, as for another, to prove need for a proposed service or that this Commission considering an application by a railroad for authority to perform an all-motor service, not in aid of its rail service but in competition therewith and with other motor carriers, can ignore the circumstance that such applicant is a railroad whose operation as proposed would ordinarily be inconsistent with the principles underlying the national transportation policy. In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. *Where it fails to show special circumstances negativing any disadvantage to the public from this fact*, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified [Emphasis added.] (40 M. C. C. at 473–474).

Subsequent cases under Section 207 in which, because of the absence of "unusual circumstances" the Commission refused to authorize railroad affiliates to perform motor carrier service which was not auxiliary and supplemental to the rail service, are *Frisco Transportation Co. Extension—Springfield Airport*, 47 M. C. C. 63 (1947), and *Texas & Pacific Motor Co. Common Carrier Application*, 47 M. C. C. 753 (1948).

In its report in the instant case (R. 105–106, 108, 116), the Commission repeated its view as to the relationship of Section 5 (2) (b) and Section 207, as follows:

> * * * Opposing carriers concede that section 207 of the Interstate Commerce Act, hereinafter called the act, the section under which this application was filed, does not contain any provisions requiring imposition of restrictions on certificates issued to motor-carrier subsidiaries of railroads, but nevertheless argue that the national transportation policy, congressional intent, and the provisions of section 5 (2) (b) of the act governing "Combinations and consolidations of carriers" (formerly section 213 of the Motor Carrier Act, 1935), require that the various forms of transportation be kept distinct so that each can operate in its own sphere independently of the other. It is claimed that these considerations mean that we do not have statutory authority to grant applicant an unrestricted certificate. We do not subscribe to this view. Our statutory authority to impose terms and conditions on a grant of authority under section 207 is derived from section 208 of the act. We have always construed these two sec-

tions in the light of the national transportation policy to require, where the circumstances warranted, the imposition of restrictions on certificates issued to motor-carrier subsidiaries of railroads. Where the circumstances did not require such action, we have issued certificates subject to a reservation to impose in the future any limitations, restrictions, or modifications that may appear necessary, and in some instances certificates have been issued without restrictions or even a reservation as just described * * * (R. 105–106).

* * * * *

These views ripened into a policy in *Kansas City S. Transport Co., Inc., Com. Car. Application, supra,* [in which] division 5 imposed 5 conditions or restrictions upon the operating authority granted to a motor-carrier subsidiary of 2 affiliated railways * * * (R. 107).

* * * * *

The main purpose for the policy of imposing the five above-quoted restrictions, or modifications thereof, was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience (R. 108).

* * * * *

> The findings hereinafter made are not to be construed as an abrogation of the policy established in *Kansas City S. Transport Co., Inc., Com. Car. Application, supra.* [10 M. C. C. 221 and 28 M. C. C. 5.] They represent an exception to that policy justified by the evidence in this proceeding. In other words, such findings do not establish a precedent. Each case of this character must be determined upon the facts and circumstances disclosed by the evidence (R. 116).

In brief, both in granting and denying applications by rail affiliates under Section 207 for authority to perform motor carrier service which is not strictly auxiliary to rail service, the Commission has applied the proviso of Section 5 (2) (b), not as a rigid limitation, but as a policy against permitting a railroad to perform ordinary motor carrier operations except to meet an unusual public need for service which other motor carriers will not or cannot meet. As in this case, even where such circumstances exist, the railroad is permitted to render ordinary or unrestricted motor carrier service only to points on or near the railroad, i. e., in the railroad's existing service area.

We submit that this consistent administrative construction of the Act, known to Congress and to the industry, serves the primary Congressional purpose of developing a national transportation system "adequate to meet the needs of the commerce of the United States."

D. Assuming that the proviso of Section 5 (2) (b) applies to the issuance of certificates under Section 207 (a), it does not preclude the Commission from authorizing a railroad controlled motor carrier to provide ordinary motor carrier service to points on or near the railroad

Assuming, *arguendo,* that the proviso of Section 5 (2) (b) also applies to the issuance under Section 207 of certificates authorizing new service, we submit that the proviso cannot be read as a rigid prohibition against permitting a rail affiliate to provide ordinary or unrestricted motor carrier service to points on or near the railroad, regardless of the public's need for service. That is, we contend that the proviso, even if applicable, does not require that rail-controlled motor carrier operations be limited to service at rail rates and on rail billing and to the pickup and delivery of largely less than truckload freight at smaller points, in any and all circumstances.

The condition of the proviso that a railroad be able "to use service by motor vehicle to public advantage in its operations," is not a precise or self-explanatory requirement. As this Court stated in *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. at 437, "The words 'auxiliary to or supplemental of' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers. Their connotation is to be gathered from the context in which they have been employed by the Commission."

Earlier in this brief, we have attempted to set forth fairly the legislative history of the proviso. That history reflects a broad purpose to prevent monopolization of motor transportation by railroad interests, together with recognition that limited motor carrier operations by railroads would be in the public

interest. Congress did not even attempt to prescribe in detail and for all times and conditions the motor carrier operations which could be performed by railroads. However, we may assume from this history that the proviso was intended to prevent a railroad from engaging in motor carrier operations entirely unrelated to its prior transportation service. Thus, the Rock Island railroad would be precluded from engaging in motor transportation between Chicago and New York. On the other hand, this history is entirely silent as to the extent and manner to which the Rock Island railroad should be permitted to provide motor carrier service to points which it already serves by rail.

From the beginning, therefore, the Commission has been obliged to exercise an informed judgment on a case to case basis in determining the precise motor carrier operations a railroad shall be allowed to perform. As noted above, even in cases under Section 5 (including the prior Section 213 (a) (1)), beginning with the leading *Barker* case, *supra,* in 1936, the Commission has consistently held that where there was an unusual public need for such service it could and would authorize a railroad to render ordinary or unrestricted motor carrier service to points on or near the railroad. In a few acquisition cases under Section 5, the Commission has authorized railroads to acquire rights to serve points not on the railroad and which otherwise would not have adequate transportation service. See, e. g., *Southern Pacific Company—Control; Pacific Motor Trucking Co.—Purchase—Lowinel Trucking Co.,* 60 M. C. C. 373 (1954). Such decisions have

been entirely consistent with the Congressional policy of prohibiting railroad monopolization of motor transportation. They strike a reasonable balance between the statutory policies of satisfying the public need for transportation and preventing railroad domination of motor carriage.

This Court has already recognized that even in acquisition cases the proviso of Section 5 (2) (b) does not embody any specific set of restrictions, such as rail billing on rail rates and key points, upon motor carrier operations by railroads. Thus, in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. at 442, it was noted that

> Undoubtedly the Commission has not consistently required each rail-affiliated motor carrier to forego motor billings or tariffs. Key points to break traffic are relatively new. * * * Rail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service. Those divergences, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission.

We submit, therefore, that even if the proviso of Section 5 (2) (b) is regarded as fully applicable to proceedings under Section 207, it did not preclude the Commission from authorizing Motor Transit to render ordinary or unrestricted motor carrier service to points which are stations on the Rock Island railroad (plus a few small points which are near the railroad line) to satisfy an unusual public need for transportation. It also follows that there is no merit to the

contention of the appellant Railway Labor Executives Association that by its action under Section 207 the Commission was evading or thwarting the policy of the proviso.

E. This Court's decisions implicitly recognize that under Section 207 (a) a railroad may be authorized to perform ordinary motor carrier service to points on the railroad

This Court has considered various aspects of the extent to which railroads may engage in motor transportation, in *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *American Trucking Assns.* v. *United States,* 326 U. S. 77; *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419; and *United States* v. *Texas & Pacific Motor Transport Co.* 340 U. S. 450. It has never held that the proviso of Section 5 (2) (b) means, even in acquisition cases, that motor carrier operations by a railroad must be limited to less-than-truckload shipments to smaller points and on railroad bills of lading at rail rates. It has never held that the proviso of Section 5 (2) (b), whatever its content, applies as a rigid limitation to the authorization of new or additional motor service under Section 207. It has never held that the proviso precludes the Commission from authorizing a railroad to provide motor carrier service to points on its railroad in order to meet a special shippers' need for service. To the contrary, we contend that the decisions of this Court implicitly recognize that the Commission is empowered under the Act to authorize a railroad or its affiliate to perform ordinary motor carrier service to points which are already stations on the railroad (plus a few small points close to the railroad).

Interstate Commerce Commission v. *Parker, supra,* involved an application under Section 207 by a railroad controlled motor carrier for certificates of public convenience and necessity authorizing new or additional motor carrier service. There, this Court upheld the power of the Commission to authorize a railroad subsidiary to engage in motor carrier operations which were supplemental to the railroad service in the sense of delivering rail-billed less-than-carload freight to way stations, even though the existing motor carriers might arrange to furnish successfully the proposed service. Much of this Court's rationale in the *Parker* case is pertinent here. It pointed out that "Section 207 (a) provides for issuance of the certificate on application, if the proposed service 'is or will be required by the present or future public convenience and necessity.' No other provisions are here involved" (Ibid. p. 64). The Court also stated that the phrase "public convenience and necessity" possesses "connotations which have evolved from the half-century experience of government in the regulation of transportation," and that Congress "chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads since the Transportation Act of 1920." The Court concluded that "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity" (Ibid. p. 65).

The *Parker* opinion expressly recognized that the National Transportation Policy "requires administration so as to preserve the inherent advantages of

each method of transportation and to promote 'safe, adequate, economical, and efficient service.'" However, this Court did not find in that Policy a rigid mechanical restriction upon the powers granted by Section 207. Instead, it pointed out that "Such broad generalizations * * * must frequently produce overlapping aims", and declared that "in such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard for the declared purposes of Congress" (Ibid. p. 66).

> It must be expected, however, that the Commission will be as alert to perform its duty in protecting the public in the maintenance of an efficient motor transportation system as it is in protecting that same public in the successful operation of its rail system. The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly (Ibid. p. 73).

Having held that where a certificate is sought under Section 207 "No other provisions are here involved", the Court only referred to the proviso of Section 5 (2) (b) in authorizing acquisition of motor carriers by railroads as evidence that the National Transportation Policy "was not intended to bar railroads from the operation of off-the-rail motor vehicles" (Ibid. pp. 66–67). Finally, this Court pointed out that in balancing these public interests which Congress has directed it to consider, the Commission has "customarily" inserted in motor carrier certificates issued to railroads conditions restricting the motor service to

service auxiliary or supplemental to the rail service (Ibid. p. 70).

Thus, *Interstate Commerce Commission* v. *Parker*, *supra*, supports the view that the power of the Commission to issue motor carrier certificates under Section 207 primarily invokes only the traditional concepts of public convenience and necessity, and that the standards of the National Transportation Act and Section 5 (2) (b) come into play, not as rigid limitations written into Section 207, but as flexible Congressional objectives to be balanced in the particular case against the public need for improved transportation service.

United States v. *Rock Island Motor Transit Co.*, 340 U. S. 419, contains more explicit recognition of the Commission's power to authorize a railroad-controlled motor carrier to engage in largely unrestricted motor carrier operations in "special circumstances", i. e., to meet an unusual public need for transportation. That case involved the acquisition under Section 5 by Motor Transit of the independent motor carriers operating the Frederickson and White Line routes. The issue before this Court in that case was whether the Commission was *empowered* (not *required*) to attach to its approval of such acquisitions conditions insuring that Transit's motor carrier oper-

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[5] In *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U. S. 450, 458–459, decided on the same day as the *Rock Island* case, this Court pointed out that the *Texas & Pacific* case involved certificates for new routes under Section 207, while no such certificates were involved in the *Rock Island* case.

ations would be auxiliary to, or supplemental of, the rail service of its parent. In brief, the issue in *Rock Island* was whether the Commission was empowered to impose the conditions which the plaintiffs in the instant case contend *must* be imposed by the Commission. While noting that such restrictions would be burdensome and expensive to Motor Transit, the Court sustained the Commission's power to impose them. Referring to the National Transportation Policy of preserving the inherent advantages of each mode of transportation, this Court concluded (at p. 431) that

> Specific statutory authority is found in the requirements of the proviso in § 213 (a) of the Motor Carrier Act of 1935 and § 5 of the Interstate Commerce Act as amended in 1940, quoted in note 3, *supra*. Railroad operations as motor carriers are forbidden by that *acquisition section* except to enable a railroad "to use service by motor vehicle to public advantage in its operations." [Emphasis supplied.]

In holding that the proviso in Section 5 (2) (b) empowered the Commission to impose such limitations in approving acquisitions of existing motor carriers by railroads or their affiliates, this Court had occasion to refer to the Commission's policy and practice under Section 207. Thus, the Court pointed out (at p. 428) that

> Although § 207, providing for the issuance of certificates of convenience and necessity, has no clause requiring special justification for railroads to receive motor-carrier operating

> rights, such as appears in the proviso in former § 213 and present § 5, the Commission applies the rules of the National Transportation Policy so as to read the proviso into § 207 in order to preserve the inherent advantages of motor-carrier service.

The Court drew its conclusion by quoting (fn. 4) with apparent approval from the Commission's opinion in *Rock Island Motor Transit Co.*, 40 M. C. C. 457 (discussed and quoted *supra*, at pp. 43–46) as follows:

> We appreciate, of course, that section 207, unlike section 5, does not require of a railroad, undertaking to prove that public convenience and necessity require a motor service which it proposes, any greater measure of proof than is required of any other applicant. But this does not mean that it is as easy for one applicant, as for another, to prove need for a proposed service or that this Commission considering an application by a railroad for authority to perform an all-motor service, not in aid of its rail service but in competition therewith and with other motor carriers, can ignore the circumstance that such applicant is a railroad whose operation as proposed would ordinarily be inconsistent with the principles underlying the national transportation policy. * * * *Where it fails to show special circumstances* negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified. [Emphasis supplied.]

Again, after referring to the Commission's application of Section 5 (2) (b) in acquisition cases, the Court stated (at p. 433) that "As indicated above in the text just preceding note 4, the Commission reads into Section 207 the same requirement. Thus a consistent attitude toward the use of motors by railroads is maintained." It further noted that

> In acquisition cases under § 5 (2) the certificate is not to be issued without the statutory findings discussed above that the proposed merger or consolidation will be in the "public interest" and that the railroad can use the motor service "to public advantage in its operations." (p. 436),

while "In original applications under § 207, the fact that the applicant is a railroad brings up other questions of transportation policy. See note 4, *supra*."

More significant, this Court pointed out (at p. 442) that

> Rail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service. Those divergences, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission. It is because Congress could not deal with the multitudinous and variable situations that arise that the Commission was given authority to adjust services within the limits of the Motor Carrier Act.

It cited in support of this statement *Rock Island Motor Transit Co. Extension—Wellman, Iowa*, 31 M. C. C. 643 (discussed *supra*, at pp. 41–42), in which

the Commission authorized an extension of service under Section 207 by a railroad affiliate so as to permit it to render unrestricted motor carrier service to points needing such service. And the Court also cited "55 M. C. C. 567, 584" (which was the Commission's reaffirmance of its decision in 40 M. C. C. 457 to impose upon Motor Transit's operations the five conditions then before the Court), in which the Commission characterized its earlier *Rock Island Transit Co. Extension—Wellman, Iowa,* case, *supra,* as follows:

> Also cited is *Rock Island Motor Transit Co. Extension—Wellman, Iowa,* 31 M. C. C. 643, wherein we granted Transit unrestricted motor-carrier authority under section 207 of the act. There we found that evidence of unusual circumstances established that public convenience and necessity required the issuance of a certificate to perform all-motor operations independently of rail service, and that the carrier so operating would not invade the territory of other rail lines or endanger or impair the operations of existing motor carriers. Thus, we specifically found a need for a service not limited to a service auxiliary or supplementary to rail service. This case is without significance here, for as we indicated in the prior report herein, *special circumstances* may prevail justifying the issuance of unrestricted motor-carrier authority to a rail applicant; and the case cited, and there are others, is but an example of such circumstances.

In brief, we believe that in the *Rock Island* case this Court implicitly approved the Commission's policy and practice of not applying the proviso of Section 5 (2)

(b) in Section 207 cases in which there were "special circumstances", i. e., a special public need for new or additional transportation service.

In *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U. S. 450, decided simultaneously with the *Rock Island* case, this Court sustained the *power of the Commission to impose* upon certificates issued under Section 207 to railroad subsidiaries substantially the same conditions which were attached to the approval of an acquisition of a motor carrier in the *Rock Island* case. The Court stated (at pp. 458-459):

> This proceeding involves certificates for new routes under § 207. No such certificates or applications were in (the Rock Island) case. The opinion, however, considered the Commission's practice in § 207 proceedings and stated that it was the same as in §§ 5 and 213 acquisition proceedings. We now hold that the same considerations justify the reservation in issue here.

Nothing in the *Texas & Pacific* opinion suggests that the Commission is required to impose those or other restrictive conditions under any and all circumstances in authorizing motor carrier operations under Section 207.

Perhaps the strongest confirmation that this Court has not read the proviso of Section 5 (2) (b) as a rigid limitation in Section 207, is that even in an *acquisition* case such as was before it in *Rock Island*, the Court never suggested that Section 5 (2) (b) *requires* the Commission to restrict even *acquired* motor carrier operations to essentially less-than-carload shipments to small points on rail billing and

rates. Indeed, as the Court pointed out (at p. 437): "The words 'auxiliary to or supplemental of' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers."

We submit that the decisions of this Court stand for the propositions that the proviso of Section 5 (2) (b) necessarily gives the Commission considerable discretion in determining the type of motor carrier operations which may be conducted by a railroad consistently with the Congressional purpose of preventing railroad domination of motor transportation, and that in making such determinations the Commission may take into account the special needs of shippers on or near the railroad for motor service which independent motor carriers cannot or will not provide.[6] Specifically, they sustain the conclusion of the court below that the proviso of Section 5 (2) (b)

[6] Similar questions have arisen under Section 408 (b) of the Civil Aeronautics Act which, modelled upon Section 5 (2) (b) of the Interstate Commerce Act, prohibits the Board from approving an acquisition of control of an air carrier by a non-air carrier "unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

In *Pan-American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (C. A. 2, 1941), the Court of Appeals for the Second Circuit, citing the Interstate Commerce Commission's decision in the *St. Andrews Bay Transportation Co.* case, *supra*, and quoting from its decision in the *Santa Fe Trail Stages* case, *supra*, held that the issuance of a certificate of public convenience and necessity under Section 401 for new air carrier service by a shipping company subsidiary was not limited by the restrictions of Section 408 (b), "though the ability of Export to meet the standards therein might be considered by the Board and by the President in connection with granting certifi-

applies to Section 207 as a flexible policy (rather than a rigid requirement) which "permits the Commission to be governed in exceptional circumstances by the needs of the public convenience and necessity" (R. 194).

II

The Commission's order is based upon adequate findings supported by substantial evidence

In the instant case, the Commission applied the policy of Section 5 (2) (b) of the Act by stating that its administrative policy of restricting motor car-

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cates of *public convenience and necessity*." 121 Fed. 2d at 846. See also, *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, 197 F. 2d 384 (C. A. D. C., 1952), and particularly the dissenting opinion of Judge Prettyman.

In 1947, between the *Pan American* and *National Air Freight Forwarding Corp.* cases, the Civil Aeronautics Board, in *American President Lines, Ltd., Petition*, 7 C. A. B. 799 (1947), carefully reconsidered its understanding of the relationship between Section 401 and 408 of the Civil Aeronautics Act in the light of the *Pan American* decision and the Interstate Commerce Commission's construction of Sections 5 (2) (b) and 207 of the Interstate Commerce Act. Thereupon, the Board concluded that "We are of the opinion that a surface carrier applying for [an air carrier] certificate of public convenience and necessity would be under the necessity of showing that disadvantages existing upon the facts of the particular case by reason of its being a surface carrier were avoided or overcome by other considerations of public interest supported by the record." The concurring opinion of Board Member Landis points out difficulties created by the *Pan American* decision of the Second Circuit and intervening decisions of the Board. Thus, under similar provisions of the Civil Aeronautics Act, the Board has in effect adopted the Commission's "unusual circumstances" doctrine. In *Great Lakes Area Case*, 8 C. A. B. 360, 402–405 (1947) the Board applied this doctrine in authorizing a surface carrier to perform a helicopter service.

rier operations by a railroad "should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience." (R. 108). The Commission's conclusion that these conditions were present in this case is founded upon substantial evidence.

A. The competitive effect upon independent motor carriers

In authorizing, pursuant to Section 207 (a), the motor service here involved, the Commission specifically took into account the provision in the proviso of Section 5 (2) (b) that it shall find that motor carrier operations by a railroad or its affiliate "will not unduly restrain competition."

The present case provided a unique record for the determination of the effect of Motor Transit's proposed operations upon independent motor carriers. Since 1951, Motor Transit's operations over the routes involved have been conducted pursuant to a temporary authority under Section 210a (a) restricting it to shipments not in excess of 5,000 pounds and prohibiting movements between or through Chicago, Omaha and, collectively, Davenport, Bettendorf, Rock Island, Moline, and East Moline (*supra*, pp. 6–7). However, Motor Transit had operated without such restrictions over the White Line for more than 13 years prior to 1951, and over the Frederickson Line route for seven years. Thus, when the Commission issued its report

in November, 1954, it was able to base its judgment as to competitive effect upon extensive past operations, rather than solely upon prediction.

Thus, the Commission noted (R. 101) that

> * * * These opposing carriers concede that during the approximate 14-year period in which time applicant was operating over the involved routes without restricting its service, the volume of traffic handled by each of these carriers has increased substantially and generally to a greater extent than did the volume transported by applicant.

Again, it found (R. 113) that

> * * * The less-than-carload traffic moving by railroad over a recent 5-year period has consistently declined. During a comparable period the volume of traffic handled by a group of nine motor carriers serving the Midwest area increased substantially. Applicant's tonnage also increased, but not to the extent of its competitors represented by this group of carriers.

Accordingly, the Commission concluded that "the operations of applicant have not unduly restrained competition, and there is no evidence that its proposed operations would produce such a result" (R. 113).

This finding is supported by substantial evidence (Ex. 8, R. 1851; Ex. 9, R. 1852; Ex. 10, R. 1854; Ex. 11, R. 1856; and Ex. 12, R. 1859).

In a related contention, the appellants contend that Motor Transit's application should have been denied because of the possibility that it would be unfairly

subsidized by its rail parent. In its report (R. 104), the Commission reviewed prior financial and contractual relationships between Motor Transit and the Rock Island railroad, and concluded that

> * * * there is no substantial evidence that these things have during the past several years materially affected the operations of the opposing motor carriers. From the past history of Motor Transit's operations there is little reason to believe that future operations would be conducted in any radically different manner from those in the past.

However, noting that as to some of these agreements the record was vague, the Commission imposed the condition "that all contractual arrangements between the Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties" (R. 117).[7] In so doing, the Commission has retained effective power to prevent unfair subsidization of Motor Transit's operations by its rail parent. This is in addition to the Commission's general powers under Section 216 (g) to set aside rates which are not just and reasonable.

Also, the Commission stated in its report that "we shall retain jurisdiction to impose in the future whatever restrictions or conditions, if any, appear neces-

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[7] This is identical with one of the five conditions imposed by the Commission in the prior proceeding and considered by this Court in *United States* v. *Rock Island Motor Transit Co.*, *supra*.

sary in the public interest by reason of material changes in conditions or circumstances surrounding applicant's operations in relation to those of competing motor carriers" (R. 115). Accordingly, it subjected the grant of authority to Motor Transit to the further condition "that there may be attached from time to time to the privileges granted herein such reasonable terms, conditions, and limitations as the public convenience and necessity may require" (R. 117).

We submit that the Commission's findings and the conditions which it imposed are fully responsive to the statutory policy that the Commission determine that motor carrier operations by a railroad "will not unduly restrain competition."

B. The public need for the transportation service authorized by the Commission's order

The appellants also attack in part (App. br. in No. 6, pp. 51–57) the Commission's finding that "the present and future public convenience and necessity" require the motor carrier service which it authorized Motor Transit to perform. They expressly "concede that there was sufficient evidence of record to enable the District Court to sustain the Commission's order insofar as it authorized a bona fide auxiliary and supplemental service to be rendered to and from such relatively minor points as Brooklyn, Colfax, Marengo, Newton, Oxford, Victor, Walcott and Wilton Junction." However, they contend that there is no proof of need for ordinary or "unrestricted service by Motor Transit between such major points as Chicago,

Davenport, Cedar Rapids, Des Moines, Council Bluffs and Omaha" (App. br. in No. 6, pp. 51–52). Elsewhere, they broaden their attack to contend that there was no proof of need for Motor Transit's service between Chicago, Omaha, Des Moines, Tri-Cities, Iowa City, Grinnell, Newton and Atlantic (App. br. in No. 6, p. 54).

In brief, the appellants concede a public need for Motor Transit to perform what would be in substantial part less-than-truckload service on rail bills of lading and at rail rates between the small towns, and between a larger town and the adjacent smaller towns intermediate to the next so-called major point. They would preclude Motor Transit from performing motor transportation between any two points each of which has a population in excess of 6,000. We contend that there was ample evidence to support the Commission's conclusion that the public convenience and necessity required that Motor Transit's operations should not be so restricted.

The Commission found (R. 110), and it is undisputed, that "Applicant is the only carrier that for a considerable number of years has maintained daily (generally at least 5 days a week) scheduled peddle operations over the entire White Line and Frederickson Line routes regardless of the volume of traffic available for movement in such operations." After summarizing the testimony of many shippers and of motor carriers which interchange freight with Motor Transit, the Commission made the following findings (R. 114–115):

The evidence abundantly establishes that public convenience and necessity require the proposed less-than-truckload peddle operations. In addition to the testimony of the many public witnesses regarding their need for such service, there must be taken into consideration that not one of the opposing motor carriers having the requisite authority has established or offered to establish scheduled peddle operations to replace each such operation, conducted by Motor Transit prior to August 30, 1951, and, by refraining from doing so, they no doubt realize that such peddle operations could not be profitably operated with interstate traffic only. The peddle service provided by Motor Transit has been, and to a limited extent, due to the weight limitation, is, based on interstate, intrastate, and rail-billed traffic. With these three kinds of traffic available it is patent that Motor Transit could provide better service to the public than the motor carriers who claim that they can take over Motor Transit's interstate motor-billed business. These carriers hold no intrastate rights on the considered White Line and Frederickson Line routes and cannot obtain such rights because it is the policy of the Iowa State Commerce Commission to grant such rights to only one carrier on a given route. Motor Transit possesses such rights on these routes.

There is some evidence of a public need for the proposed truckload services of applicant, but it is not as convincing as that with respect to the peddle operations, and this is understandable because the other motor carriers operating in the area have usually provided satis-

factory service on truckload shipments. There is also some evidence that the latter have refused to accept truckloads of low-rated commodities. In any event we feel that there is sufficient basis to warrant a complete grant of authority to applicant. This truckload "cream of the traffic," which to some extent has been handled by Motor Transit for many years without seriously affecting the expansion of its competitors' operations, should not be handed over to its competitors and Motor Transit expected to provide the expensive peddle services.

Acceptance of the opposing motor carriers' position would have the following results. They would be left to provide the peddle services on interstate motor-billed traffic, which alone will not justify the type of services heretofore rendered by Motor Transit, and all such traffic in truckloads. Motor Transit would be left with intrastate and rail-billed traffic, which will not warrant continuance of the operations conducted by it prior to August 30, 1951. The net result is clearly not in the public interest.

There is ample evidence to support the Commission's finding that the public convenience and necessity require Motor Transit's regular peddle service along the routes involved. Thus, the testimony of 111 shippers and consignees at points on the White Line and Frederickson Line routes as to their transportation needs, was summarized by the Commission as follows (R. 110–111):

* * * The witnesses located at points in Iowa have used the services of Motor Transit over a period of many years and have, to a consider-

able extent, built their businesses on that service, particularly with respect to less-than-truckload shipments. With that service available, they do not have to maintain large inventories because they can order from the manufacturer or wholesaler at the supply points, such as Chicago, Minneapolis-St. Paul, Omaha, Kansas City, or Moline, early one day and be reasonably certain of delivery on the next day in some instances, and in others not later than the second day. Some of them stressed their need for this service in obtaining expedited movement of repair parts, including those for farm machinery. * * *.

Reflecting the importance of delivery to points on these routes of freight received in interchange from other motor carriers, the Commission found (R. 110) that

> * * * These [opposing] carriers prior to August 30, 1951, delivered less-than-truckload freight to Motor Transit for movement to destinations they are authorized to serve. Some of this freight consisted of low-rated articles which such carriers deemed unprofitable to handle. These carriers in many instances refused to accept less-than-truckload shipments from their motor-carrier connections for movement to a destination embraced in their operating authority. As a result thereof, several of these connecting carriers have had to rely upon Motor Transit to accept and make delivery of such shipments, even in cases where the delivering carrier was designated by the shipper. These experiences have convinced some of the connecting carriers that the unrestricted serv-

> ices of Motor Transit should continue to be available to them so that they may have a carrier that is always willing and able to accept interchange shipments destined to points on the White Line and Frederickson Line routes. * * *.

Similarly, the Commission noted (R. 98–99) that

> Eight motor carriers have been and are interlining traffic with applicant, principally at Chicago and the Tri-Cities. Generally these carriers do not ordinarily experience any difficulty in interlining shipments destined to the larger points of population on U. S. Highway 6, such as Des Moines and Newton, but they are of the opinion that applicant must be in a position to serve these points and to handle overhead traffic in order to provide the required service, particularly the expensive peddle operations, at the smaller points to avoid sustaining a loss on the entire operation. Several of these carriers are members of the American Trucking Associations, Inc., which is opposing the application.

The Commission also considered in its report the operating authority and the actual operations of the appellant motor carriers and concluded that they could not or, in any event, had not, performed over most of the routes in question a regular service comparable to that performed by Motor Transit (R. 111–113).

It is undisputed that it is the general policy of the Iowa State Commerce Commission to grant intrastate operating rights to only a single carrier on a particular route (R. 98), and that Motor Transit has exclusive intrastate rights over the White Line and Frederickson Line routes (R. 114). Moreover, we do not

understand the appellants to challenge the Commission's conclusion that regular, scheduled peddle service can be performed in a sparsely populated area, as a matter of economics, only by a motor carrier who possesses both intrastate and interstate operating authority. Rather, they contend "that the Commission in this proceeding is permitting itself to be dominated by the Iowa Commission's policy of intrastate monopoly" (App. br. 65).

The Interstate Commerce Commission is without power to interfere with the policies of the State Commission in issuing certificates of public convenience and necessity relating to intrastate commerce. Indeed, Congress provided specifically in Section 202 (b) that "Nothing in [Part II dealing with motor carriers] shall be construed * * * to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." However, we submit that it is entirely proper for the Commission in administering Section 207 to take into account the effect of such State policies, just as it considers other transportation conditions.

As noted above, the appellants claim that there is no proof of public need for Motor Transit's service between the major points on these routes, amounts to a claim that there is no justification for authorizing such service between any of the points with a population in excess of 6,000 persons. For convenience, we repeat here the Commission's findings and reasoning on this aspect of the case (R. 115):

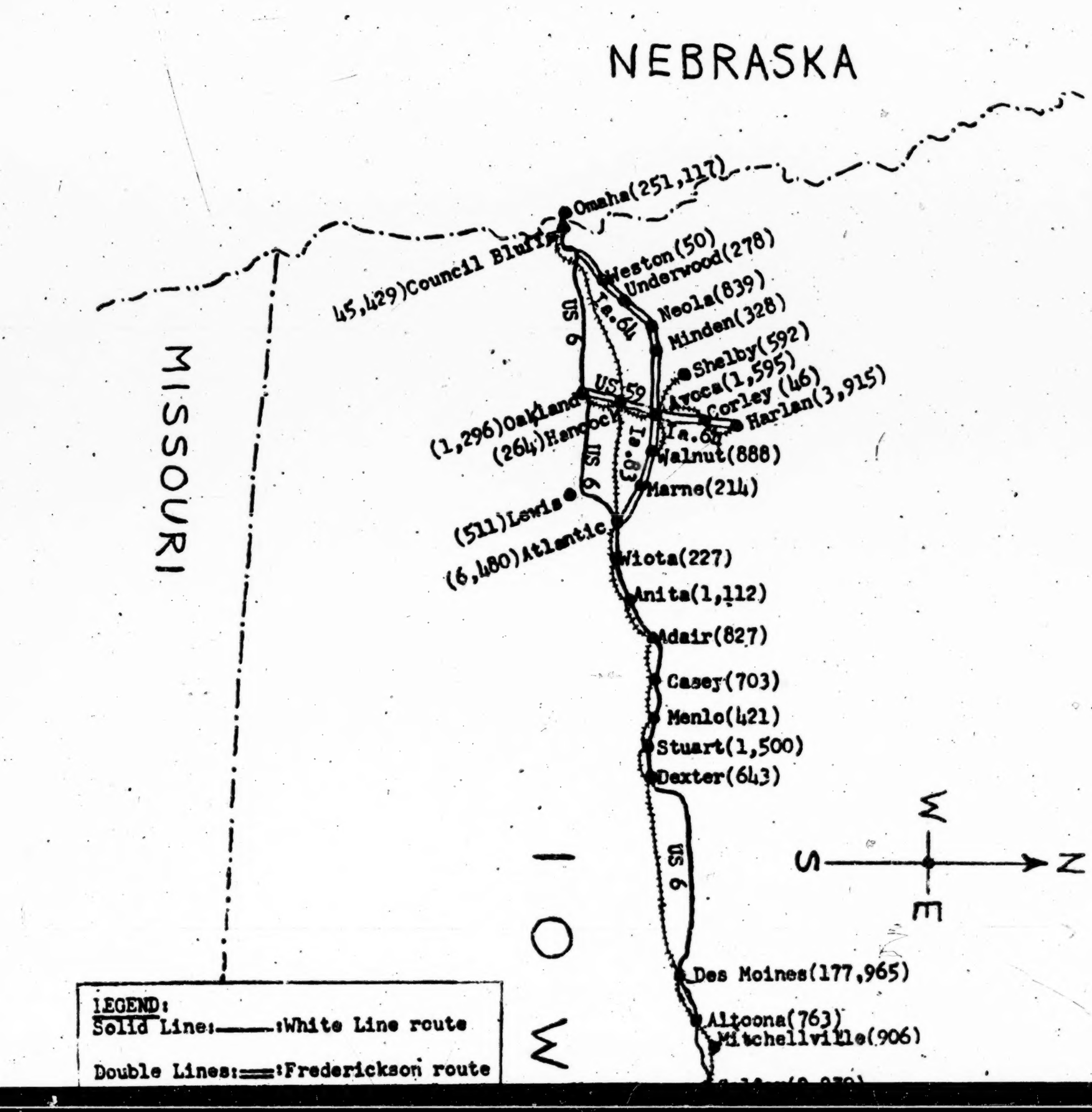
> There is some evidence of a public need for the proposed truckload services of applicant, but it is not as convincing as that with respect to the peddle operations, and this is understandable because the other motor carriers operating in the area have usually provided satisfactory service on truckload shipments. There is also some evidence that the latter have refused to accept truckloads of low-rated commodities. In any event we feel that there is sufficient basis to warrant a complete grant of authority to applicant. This truckload "cream of the traffic," which to some extent has been handled by Motor Transit for many years without seriously affecting the expansion of its competitors' operations, should not be handed over to its competitors and Motor Transit expected to provide the expensive peddle services.

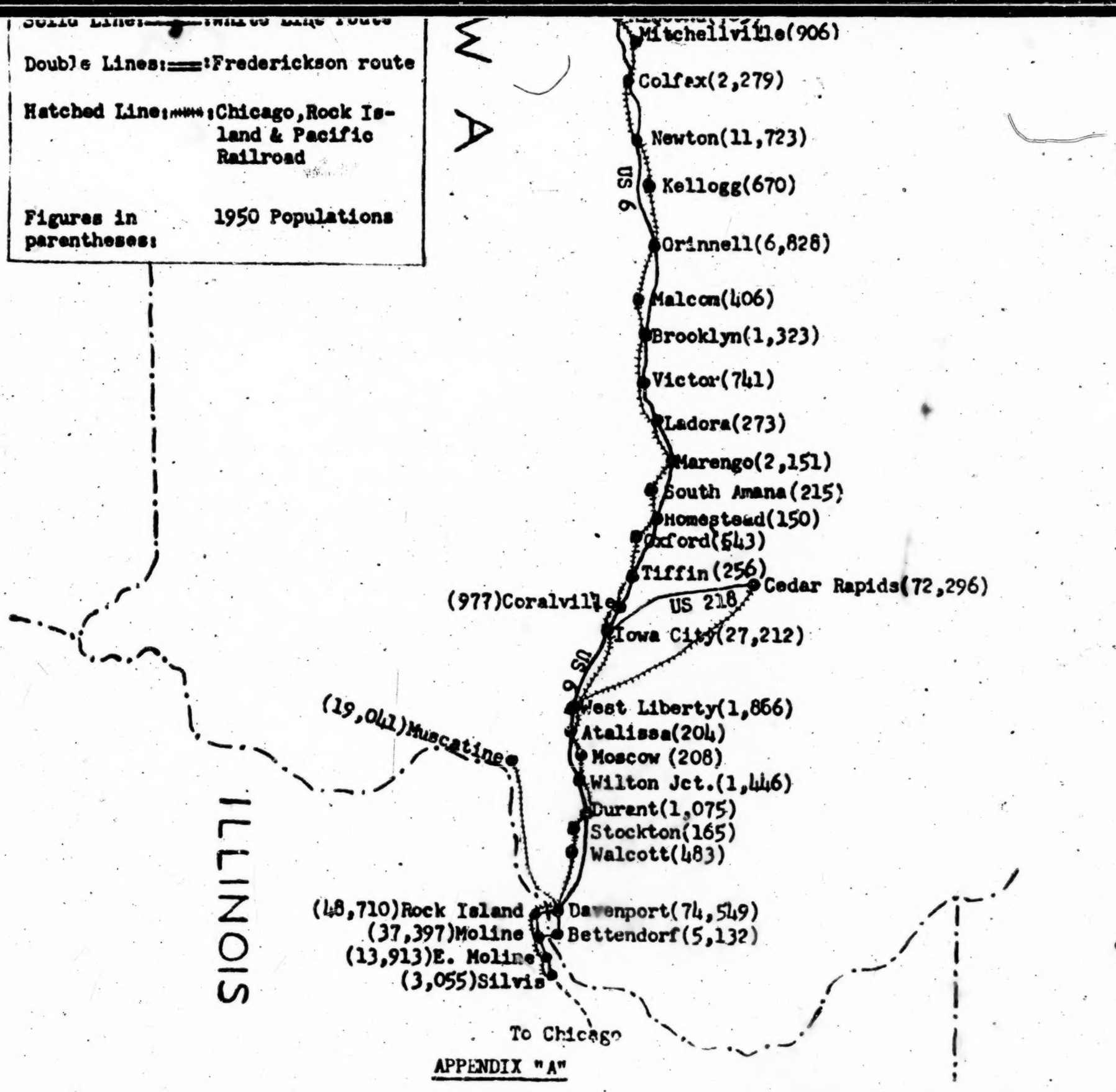
It is axiomatic that regular peddle service to small communities, involving the handling of many less-than-truckload shipments, is relatively costly to perform. Generally, motor carriers prefer to handle truckload shipments which tend to have their origin and destination at larger points. As the Commission noted (R. 98), Chairman Reed of the Iowa State Commission testified that "The trend in this State in the matters that we have contact with has been that the carriers generally are getting away from the local service and the smaller shipments" (R. 742). We submit that it was consistent with the basic concept of common carriage, and within the Commission's regulatory discretion, for it to conclude that the only carrier which can and will provide regular peddle service to the

smaller towns also shall be allowed to compete for the more profitable truckload traffic between the larger points on the same routes. That motor carriers have an obligation to serve both large and small shippers, rather than "skimming the cream" of truckload traffic, is not a new principle in motor carrier regulation. It has been applied by the Commission in a variety of circumstances. See *Keele Common Carrier Application—New Operation*, 30 M. C. C. 173, 181; *D. A. Beard Truck Lines Co. Com. Car. Applic.—New Operation*, 30 M. C. C. 197, 205; *The Emery Transportation Company, Extension—Jeffersonville Radius*, MC-9685 (Sub No. 9) (not officially reported), 8 Fed. Carr. Cas. par. 31,962; *Mid-States Freight Lines, Inc.—Purchase—Carlo Transp. Co.*, 57 M. C. C. 581, 595; *Osborne Extension—Lower Minimum Weight Shipments*, 64 M. C. C. 553, 554.

Moreover, as the Commission found (R. 115) "There is some evidence of a public need for the proposed truckload services of [Motor Transit]." This evidence may be summarized as follows:

At the outset, it should be noted that the testimony of many of the witnesses whose testimony was summarized by the Commission in its report (R. 110–111), supported a need for Motor Transit's service at and through the so-called larger points, as well as to the smaller towns. It is fair to say that the case was not tried before the Commission in terms of a distinction between the need for service to the small towns and need at the larger points. Nevertheless, there was substantial evidence that shippers had reeeived from Motor Transit a better service to and between the


NEBRASKA
MISSOURI
IOWA
Omaha(251,117)
45,429)Council Bluffs
Weston(50)
Underwood(278)
Neola(839)
Minden(328)
Shelby(592)
Avoca(1,595)
Corley (46)
Harlan(3,915)
(1,296)Oakland
(264)Hancock
Walnut(888)
Marne(214)
(511)Lewis
(6,480)Atlantic
Wiota(227)
Anita(1,112)
Adair(827)
Casey(703)
Menlo(421)
Stuart(1,500)
Dexter(643)
Des Moines(177,965)
Altoona(763)
Mitchellville(906)
US 6
Ia. 44
US 59
Ia. 83
Ia. 6
S
W
E
N
LEGEND:
Solid Line:——:White Line route
Double Lines:═══:Fredericksoni route


Double Lines: Frederickson route
Hatched Line: Chicago, Rock Island & Pacific Railroad
Figures in parentheses: 1950 Populations
Mitchellville(906)
Colfax(2,279)
Newton(11,723)
Kellogg(670)
Grinnell(6,828)
Malcom(406)
Brooklyn(1,323)
Victor(741)
Ladora(273)
Marengo(2,151)
South Amana(215)
Homestead(150)
Oxford(643)
Tiffin(256)
Cedar Rapids(72,296)
(977)Coralville
US 218
Iowa City(27,212)
West Liberty(1,866)
Atalissa(204)
Moscow (208)
Wilton Jct.(1,446)
Durant(1,075)
Stockton(165)
Walcott(483)
(19,041)Muscatine
(48,710)Rock Island
(37,397)Moline
(13,913)E. Moline
(3,055)Silvis
Davenport(74,549)
Bettendorf(5,132)
US 6
US 218
ILLINOIS
To Chicago

APPENDIX "A"

larger points than they had been able to receive from other motor carriers.

Thus, shipper witnesses from *Chicago* (Macdonald, R. 268–277); Lussa, R. 277–281; Ozinga, R. 281–286; Hoppe, R. 286–290), from *Tri-Cities* (Davenport, Rock Island and Moline) (Stevens, R. 467–480); Gans, R. 257–268; Schunter, R. 321–329; Pahl, R. 880–885), from *Muscatine* (Gould, R. 1263–1267; Sweany, R. 1251–1263), from *Iowa City* (Jacobs R. 486–490; Nesmith, R. 490–493; Swanholm, R. 493–497; Slager, R. 1142–1149; Wegmuller, R. 1136–1142), from *Grinnell* (Zimmerman, R. 713–716; Mathews, R. 716–720; Ritter, R. 734–738; McKean, R. 747–751; Brink, R. 752–760), from *Newton* (Denniston, R. 783–790; Dunn, R. 791–795; Engle, R. 795–813), from *Des Moines* (Griffith, R. 1313–1316; Louberto, R. 1299–1306; Triggs, R. 1289–1299), from *Atlantic* (Turner, R. 933–936; Mitchell, R. 546–551), from *Council Bluffs* (Ball, R. 1005–1010), and from *Omaha* (Seastedt, R. 1010–1014; Hartnett, R. 994–1005) testified variously that on shipments between the larger points they had received faster and more dependable service from Motor Transit than from other motor carriers, that other motor carriers had been reluctant to accept low-rated shipments, and that in some instances curtailment of Motor Transit's service would require them to operate their own trucks. Similar testimony that shippers would suffer if Motor Transit were not allowed to serve the larger communities on the routes in question was received from representatives of the Chambers of Commerce or traffic organi-

zations of *Chicago* (Maurer, R. 243–257), *Davenport* (Cummins, R. 227–243), *Muscatine* (Sweany, R. 1251–1263), *Cedar Rapids* (Ewoldt, R. 1117–1126), *Iowa City* (Gage, R. 484–486), *Des Moines* (Hansen, R. 1316–1320), *Atlantic* (Walker, R. 1197–1202), and *Omaha* (Heinecamp, R. 1356–1379). It should be noted that this evidence, and the Commission's finding derived from it, are based upon the service which Motor Transit actually had performed in the past, rather than mere expectations as to the service it could and would render.

The Commission did not purport to determine whether this evidence alone would have established that the public convenience and necessity required that Motor Transit be authorized to serve the larger communities. Rather, it determined that this demonstrated need, coupled with its conclusion that only Motor Transit could provide a regular peddle service to the smaller points, justified a grant of authority to Motor Transit to serve all of the points on the routes involved. We submit that the Commission's action upon this record was well within the broad discretion conferred upon it by Congress to determine what transportation service is required by the public convenience and necessity. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489.

CONCLUSION

The judgment of the three-judge court should be affirmed.

Respectfully submitted.

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